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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Michael King, et al.,

No. CV-23-00196-PHX-SMB

10 Plaintiffs,

ORDER

11 v.

12 DePuy Orthopaedics Incorporated, et al.,

13 Defendants.

14

15 Pending before the Court is Plaintiffs' Motion to Strike Case-Specific Opinions of
16 Scott D. Nelson, M.C., Ph.D. (Doc. 177). Defendants filed a response (Doc. 184), to which
17 Defendants filed a reply (Doc. 187). For the reasons outlined below, the Court will grant
18 Plaintiffs' Motion to Strike.

19 **I. BACKGROUND**

20 This Court has previously described the background of this case (Doc. 107) but for
21 ease of reference will repeat it here. This case arose out of the installation of an allegedly
22 defective "metal-on-metal" hip replacement manufactured, marketed, and sold by
23 Defendants. This hip replacement is known as the Pinnacle Acetabular Cup System
24 (hereinafter "device"). The device is used to replace diseased hip joints and was intended
25 to remedy conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or
26 fracture. It also sought to provide patients with pain-free natural motion over a longer
27 period than other hip replacement devices.

28 On June 28, 2010, Plaintiff Michael King underwent a total hip arthroplasty

1 procedure in Mesa, Arizona and had the device implanted in his left hip. After the
2 procedure, Plaintiff alleges that the friction between the cobalt-chromium components
3 caused metal ions and particles to be released into his blood, tissue, and bone surrounding
4 the implant, resulting in severe pain, discomfort, and inflammation. Because of his
5 symptoms, Plaintiff underwent a second surgery to replace the device on January 10, 2014.

6 Plaintiffs filed suit alleging negligence, strict liability, fraud, negligent
7 misrepresentation, and breach of warranty claims. (*See* Doc. 17.) In addition, Mr. King's
8 wife, Deborah King, filed a loss of consortium claim. (*See id.*) The case was initially filed
9 in the United States District Court for the Northern District of Texas as part of the multi-
10 district litigation against Defendants coordinated out of that District. This case was not
11 selected as one of the bellwether cases. *See In re: DePuy Orthopaedics, Inc.*, MDL Docket
12 No. 3:11-MD-2244-K, 2016 WL 6271474, at *1 (N.D. Tex. Jan. 5, 2016). Therefore, it
13 was consolidated for purposes of discovery and pretrial matters. *See id.*; 28 U.S.C. § 1407.
14 Litigation continued in the bellwether cases, resulting in substantial fact and expert
15 discovery.

16 As part of this discovery in September 2019 the MDL court entered Case
17 Management Order (“CMO”) 12, which required Plaintiffs to issue notices to doctors and
18 medical facilities to preserve treatment records including devices, tissue blocks and
19 pathology blocks from five years before the surgery date. (Doc. 177-2.) Plaintiffs also had
20 to provide Defendants with a list of entities/individuals who received a notice. (*Id.*) This
21 CMO became effective for the first quarter of 2021, at which point Plaintiffs sent these
22 preservation notices in May 2021. (*Id.*) In July 2021, Plaintiffs provided Defendants with
23 Plaintiff King's medical records, and the list of entities/individuals who received a
24 preservation notice as the CMO required. (Doc. 177 at 4.) In November 2022, the parties
25 produced their respective expert disclosures. (*Id.* at 5.)

26 In December 2022, this case was transferred to the District of Arizona to be heard
27 before this Court. (Doc. 41.) In February 2023, after this transfer, the parties appeared for
28 a status conference to discuss, in part, expert witnesses. (Doc. 177-4 at 5.) There,

1 Defendants informed the Court that their only case-specific expert would be Dr.
 2 Ebramzadeh. (*Id.*) The parties met again before this Court in August 2023 for a *Daubert*
 3 conference, again in October 2023 where Defendants' motion to continue the trial was
 4 granted, and once more in December 2023 for a status conference. (*Id.*) On April 15,
 5 2024, the parties met for another status conference at which time the Court set the pre-trial
 6 deadlines. (Doc. 153.) Defendants did not mention any outstanding expert discovery.
 7 (Doc. 177 at 6.) However, on April 19, 2024, Defendants provided Plaintiffs with Dr.
 8 Nelson's pathology report containing case-specific opinions regarding Plaintiff King's
 9 injuries, and cause of injuries. (Doc. 177-5.) Defendants did notify Plaintiffs about the
 10 reason for delay at that time. (*Id.*)

11 Plaintiffs now bring this Motion under Rule 26(a)(2) of the Federal Rules of Civil
 12 Procedure, asserting that the Court must strike Dr. Nelson's case-specific opinions for
 13 failing to comply with the MDL and this Court's scheduling orders. (Doc. 177 at 7.)

14 **II. LEGAL STANDARD**

15 Federal Rule of Civil Procedure 26(a)(2) provides, in relevant part:

16 (A) In General. In addition to the disclosures required by Rule 26(a)(1), a
 17 party must disclose to the other parties the identity of any witness it may use
 18 at trial to present evidence under Federal Rule of Evidence 702, 703, or
 19 705 . . .

20 (C) Witnesses Who Do Not Provide a Written Report. Unless otherwise
 21 stipulated or ordered by the court, if the witness is not required to provide a
 22 written report, this disclosure must state:

- 23 (i) the subject matter on which the witness is expected to present evidence
 under Federal Rule of Evidence 702, 703, or 705; and
- 24 (ii) a summary of the facts and opinions to which the witness is expected to
 testify.

25 Fed. R. Civ. P. 26(a)(2). "If a party fails to provide information or identify a witness as
 26 required by Rule 26(a) or (e), the party is not allowed to use that information or witness to
 27 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially
 28 justified or harmless." Fed. R. Civ. P. 37(c)(1); *Cooke v. Town of Colorado City*, No. CV
 10-08105-PCT-JAT, 2013 WL 551508, at *3 (D. Ariz. Feb. 13, 2013). Litigants must
 disclose all expert witnesses "at the times and in the sequence that the court orders."

1 *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 739 (9th Cir. 2021) (internal citation
 2 omitted.). Rule 37(c)(1) is an “automatic” sanction that prohibits the use of improperly
 3 disclosed evidence and—as stated by the rule—litigants may only avoid this sanction
 4 where “the failure [to disclose] was substantially justified or is harmless.” *Id.* at 740; Fed.
 5 R. Civ. P. 37(c)(1). This does not mean courts *must* impose the sanction, but rather that
 6 they are empowered to properly impose an exclusion sanction where the “noncompliant
 7 party has failed to show that the discovery violation was either substantially justified or
 8 harmless.” *Merchant*, 993 F.3d 733 at 740.

9 **III. DISCUSSION**

10 Plaintiffs argue that the Court must strike Dr. Nelson’s case-specific opinions as
 11 untimely for failing to comply with the MDL and this Court’s scheduling orders. (Doc.
 12 177 at 7.) Plaintiffs further argue that Defendants cannot show that their failure to comply
 13 with Rule 26 is “substantially justified or harmless” because (1) Defendants knew about
 14 the existence of pathological issues and still waited to file Dr. Nelson’s corresponding
 15 report; and (2) Plaintiffs are prejudiced by “their inability to adequately defend and rebut
 16 against Dr. Nelson’s opinions.” (Doc. 187 at 6, 10.) Conversely, Defendants argue that
 17 any late disclosure is justified because Defendants “reasonably believed” that there were
 18 no pathology slides from Plaintiff King’s surgery. (Doc. 184 at 2.) Defendants also argue
 19 that the late disclosure is harmless because “any prejudice befalling plaintiffs is largely of
 20 their own doing.” (*Id.* at 2.)

21 Several factors “guide the determination of whether substantial justification and
 22 harmlessness exist, including (1) prejudice or surprise to the party whom the evidence is
 23 offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption
 24 of trial; and (4) bad faith or willingness in not timely disclosing the evidence.” *Liberty Ins.*
 25 *Corp. v. Brodeur*, 41 F.4th 1185, 1192 (9th Cir. 2022) (internal citation omitted). The
 26 Court will analyze these factors in turn.

27 First, the Court agrees with Plaintiffs that allowing Defendants to offer Dr. Nelson’s
 28 case-specific pathology opinions would prejudice Plaintiff. As Plaintiffs note, Defendants

1 disclosed Dr. Nelson's case-specific opinions with only two months left until trial. (Doc.
 2 177 at 7.) To be able to adequately respond to these opinions, Plaintiffs argue that they
 3 would need to depose Dr. Nelson regarding those opinions, and potentially consult, retain
 4 and prepare a rebuttal witness within this short timeframe. *Ballard v. United States*, No.
 5 EDCV06-715-VAP(OPX), 2007 WL 4794101, at *4 (C.D. Cal. Aug. 28, 2007) (excluding
 6 untimely disclosed expert testimony to "prevent unfair surprise and dilatory tactics that
 7 preclude the opposing party from conducting meaningful expert discovery in
 8 preparation . . . for trial."). In other words, as Plaintiffs assert "there is simply not enough
 9 time for Plaintiffs to effectively defend and rebut Dr. Nelson's claims." (Doc. 177 at 8.)

10 As a final note on this factor, the Court finds Defendants argument that Dr. Nelson's
 11 case-specific reports are "critically important to this case" undercuts their position. (*Id.* at
 12 3.) As Plaintiffs' note, if these reports are critical to the case, Plaintiffs would surely have
 13 to, *at a minimum*, depose Dr. Nelson again. (Doc. 187 at 10.) Conducting such discovery
 14 this close to the trial date unfairly prejudices Plaintiffs, and it is not their burden, nor the
 15 Court's, to mitigate a situation caused by Defendants. Therefore, the Court finds the first
 16 factor weighs in favor of striking Dr. Nelson's case-specific opinions.

17 Next, finding that there is prejudice to Plaintiffs, the Court must ask whether there
 18 is a curative measure to mitigate this prejudice. *See Brodeur*, 41 F.4th at 1192. Plaintiffs
 19 assert that because of how close to trial Defendants disclosed this information, there is no
 20 ability to cure the untimeliness. (Doc. 177 at 7.) Defendants offer no argument for how
 21 the untimely filing could be cured, and instead argue that there is no need to cure. (Doc.
 22 184 at 2.) They claim that because only twenty-seven out of Dr. Nelson's seventy-six-page
 23 report pertains to his case specific opinions, there is "more than enough time for
 24 [P]laintiffs' to depose Dr. Nelson before trial on his case -specific opinions." (*Id.*) Even
 25 if this were true, the deposition is likely to only be one of the needed elements for Plaintiffs
 26 to prepare to rebut Dr. Nelson's opinions. The only "curative" measure the Court can
 27 imagine is to, once again, delay trial to allow Plaintiff ample time to respond to Dr.
 28 Nelson's case-specific opinions. *Schuette v. City of Phoenix*, 2010 WL 1253193, at *3 (D.

1 Ariz. Mar. 2010) (“Unexpected delays are common to litigation” however “[t]he
 2 unpredictable nature of litigation . . . does not excuse missed deadlines.”). Therefore, the
 3 Court finds there is likely an inability to cure the prejudice to Plaintiffs if Dr. Nelson’s
 4 case-specific opinions were not stricken.

5 In that same vein, the third factor—the likelihood of disruption to trial—also weighs
 6 in favor of striking Dr. Nelson’s case specific opinions. This trial is set to begin on July 9,
 7 2024. Defendants did not notify Plaintiffs, or the Court, of this opinion until April 19,
 8 2024. The instant motion was not even ripe for the Court to decide upon until May 30,
 9 2024. Defendants, as stated above, argue that Plaintiffs have enough time to prepare
 10 without disrupting trial. And although there may be a *possibility* for their preparation, the
 11 *likelihood* is that allowing Dr. Nelson’s case-specific opinions will result in a disruption to
 12 the already set trial schedule, with the final trial management conference less than a month
 13 away. *See Mansur Properties LLC v. First Am. Title Ins. Co.*, 635 F. Supp. 3d 1116, 1134
 14 (W.D. Wash. 2022) (finding untimely disclosure of expert opinion would “necessarily
 15 disrupt the trial date because [defendant] would have to be afforded an opportunity to
 16 conduct additional discovery . . .”). Therefore, the Court finds Defendants’ untimely
 17 disclosure has a high likelihood of disruption to trial.

18 The final factor asks the Court to consider whether Defendant acted with bad faith
 19 or an unwillingness to disclose this information. *See Brodeur*, 41 F.4th at 1192. The Court
 20 will not go so far as to say that Defendants acted with “bad faith” in their untimely
 21 disclosure of Dr. Nelson’s case-specific opinions. However, bad faith is not a pre-requisite
 22 to excluding expert testimony due to late disclosure. *See Hoffman v. Constr. Protective
 23 Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008). Here, despite having several
 24 opportunities to do so, Defendants failed to notify the Court of Mayo Clinic’s alleged
 25 “errant” record keeping, or any other discovery issues, which they argue led to their delayed
 26 disclosure. In other words, Defendants could have brought these issues to the “Court’s
 27 attention in a timely manner. Instead of doing so, [they] created their own remedy in the
 28 form of late supplemental disclosures after there was no further opportunity for any

1 discovery by the Plaintiffs to take place and the case was otherwise ready to [be tried].”
 2 *Leland v. Cnty. of Yavapai*, No. CV-17-8159-PCT-SPL (DMF), 2019 WL 1546998, at *4
 3 (D. Ariz. Mar. 18, 2019), *report and recommendation adopted*, No. CV-17-08159-PCT-
 4 SPL, 2019 WL 1531874 (D. Ariz. Apr. 9, 2019). So, although the Court will not go so far
 5 as to find that Defendants acted in bad faith, it will find that they acted in poor form.

6 Defendants —instead of focusing on the four factors analyzed here—base the bulk
 7 of their argument around the late disclosure being “substantially justified” because of
 8 “Mayo Clinic’s errant record-keeping” which led to late discovery of the pathology slides
 9 implicated here. (Doc. 184 at 1.) Additionally, Defendants argue that Plaintiff King’s
 10 affidavit did not identify any pathology related issues, therefore they were unaware that
 11 such issues existed. (*Id.* at 4.) The Court, however, agrees with Plaintiffs that Plaintiff
 12 King’s silence as to pathological issues does not excuse Defendants’ failure to identify
 13 such issues. Plaintiffs provided the required notices, putting Defendants on notice that
 14 such pathological issues may be part of this case, and “[t]he onus was on Defendants to
 15 review the discovery provided and determine what, if any, additional information they
 16 needed and issue requests accordingly.” (Doc. 187 at 9.)

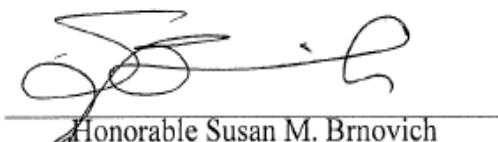
17 Simply put, it is not the Court’s job to squeeze in Defendants’ eleventh-hour
 18 disclosure without ever being asked for an extension or notified of issues surrounding this
 19 disclosure when they first arose. *See Wong v. Regents of U. of California*, 410 F.3d 1052,
 20 1062 (9th Cir. 2005) (“Courts set such schedules to permit the court and the parties to deal
 21 with cases in a thorough and orderly manner, and they must be allowed to enforce them,
 22 unless there are good reasons not to.”).

23 **IV. CONCLUSION**

24 Accordingly,

25 **IT IS ORDERED** granting Defendants’ Motion to Strike Case-Specific Opinions
 26 of Scott D. Nelson, M.D., Ph.D. (Doc. 177).

27 Dated this 14th day of June, 2024.



Honorable Susan M. Brnovich
United States District Judge